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Supreme Court of the United States

October Term, 1976

No. 76-266

ORWIN B. GRIFFIN, JR.,
Petitioner,

vs.

RICHARD V. ZURZ, Individually and as Judge of the Court of Common Pleas for Summit County, Ohio; WILLIAM B. PIKE, Individually and as Referee of the Court of Common Pleas for Summit County, Ohio; and HOWARD L. CALHOUN, Individually and as an Officer of the Court of Common Pleas for Summit County, Ohio,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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For the Sixth Circuit

Petitioner respectfully prays that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review a final judgment of that Court.

OPINIONS AND ORDERS BELOW

The United States District Court for the Northern District of Ohio, Eastern Division, issued its Order (Appendix A) and Judgment Entry (Appendix B) on July 2, 1975. The United States Court of Appeals for the Sixth Circuit issued its Order (Appendix C) affirming the judg-

ment below on April 15, 1976 and issued its Order (Appendix D) denying the petition for rehearing on May 27, 1976.

JURISDICTION

1. The United States Court of Appeals for the Sixth Circuit issued a judgment on April 15, 1976 and issued its order denying the petition for rehearing on May 27, 1976. The jurisdiction of this Court is invoked pursuant to Title 28 U. S. Code Sec. 1254 (1).

QUESTIONS PRESENTED

1. Does a judge have an obligation to complete a trial he undertakes and is able to complete and has no reason for refusing to complete?

2. Does the deliberate refusal, without cause or explanation, of a judge to complete a trial hearing which he has started and is able to complete, constitute a denial of due process or equal protection of law?

3. Is there such a concept in American jurisprudence as "switching judges in midstream" of a trial, particularly where the judge is the finder of fact?

4. Can imprisonment be legally ordered where it is based on a purported "judgment" containing jurisdictional statements known to be false by the attorney who prepared and signed, and by the referee who signed, the "judgment" and who thereby caused a judge to issue such "judgment"?

The answers to these questions are self-evident. Respondents' behavior is outrageous and almost incredible; and no honest and reasonable person can countenance the conduct implied in the questions presented.

CONSTITUTIONAL PROVISIONS INVOLVED

Article Six (Supremacy Clause), United States Constitution:

> ". . . This Constitution . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding . . ."

Fifth Amendment, United States Constitution:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Fourteenth Amendment, United States Constitution:

> "Section I: . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. Nature of Case and Disposition by Courts Below

This case arises (a) directly under the due process and equal protection clauses of the Constitution and (b) under the Civil Rights Act (42 U.S.C. Sec. 1983). The District Court's jurisdiction is based, *inter alia*, on 28 U.S.C. Sec. 1331. Damages, a permanent injunction, and any other appropriate remedy are sought. The case involves a "case within a case", so to speak, since it challenges the validity of actions taken by state court officials in a state court action.

The Complaint charged that a state court judge and a state court referee acted without jurisdiction in separate instances, with the result that *purported*, but not valid, "judgments" were entered against Petitioner (defendant in the state court). The Complaint further charged that an attorney, acting as an officer of the court, prepared one of the "judgments" and included therein false statements relating to the referee's jurisdiction; and that the attorney also prepared the other "judgment" knowing the state court judge did not have jurisdiction to issue it.

The Respondent state court judge is attempting to hold Petitioner in contempt of a supposed prior "judgment", even though the original trial judge, after starting the trial and hearing five days of testimony, simply abandoned the case and refused to complete it. The original trial judge never issued a final judgment or made any adjudication of the merits; and the case was never transferred to any other judge. *Thus, no judgment exists for the Respondent judge (Judge Zurz) to enforce.*

The lack of jurisdiction of the referee in the other instance is because the interlocutory matters he undertook to rule on had never been referred to him, although the "judgment" entered as the result of the referee's recommendations *falsely recited* that said matters had been "duly assigned" to him. As a result of the falsely-based interlocutory "judgment" (which itself was never enforced) the Respondent state judge (Judge Zurz) ordered that Petitioner be jailed.

Judge Contie of the United States District Court treated a Motion to Dismiss, filed by Respondents, as one for summary judgment and granted same (Appendix A). Although he found that Judge Koledin refused to complete the trial and "may have had a duty" to do so, Judge

Contie's Order appears to be based on an assumption that the state judge (Zurz) and referee (Pike) were acting within their jurisdiction so as to give them immunity from damages; and that the attorney was not acting "under color of state law" as referred to in Sec. 1983. Judge Contie demurred on the question of an injunction.

The United States Court of Appeals found, *contrary to fact*, that a state appeals court had determined that there was ". . . an irregular but harmless transfer . . ." of the case in mid-trial. The Court of Appeals decided, without any rationale, that no constitutional deprivation occurred (Appendix C). It denied a petition for rehearing, without elucidation (Appendix D).

II. Relevant Facts

The underlying state case, *Griffin v. Griffin*, was docketed as No. 282105 in the Summit County, Ohio, Court of Common Pleas. Testimony began on February 3, 1971 before the domestic relations judge, Judge Sam Koledin. On February 12, 1971, after hearing 5 days of testimony but before the trial was completed, Judge Koledin recessed the trial, giving no reason on the record. (Months later he claimed he had become ill and that this was the reason for the recess. However, this claim conflicts with the reasons given informally on February 12.)

Judge Koledin was away from his office for about 4 weeks from February 12 but returned to his judicial duties sometime in late March or early April, 1971. Upon his return, he conducted other trials but refused to complete the trial of Case No. 282105.

If Judge Koledin could be thought to have overlooked the case, it was brought repeatedly to his attention by various motions and other documents filed in the case dur-

ing the Spring and Summer, 1971. In particular, Petitioner, desperately trying to get the case off dead center, filed a Motion to Dismiss on July 28, 1971.

At no time did the plaintiff therein ask Judge Koledin to complete the trial.

No hearing was held in Case No. 282105 between February 12, 1971 and October 21, 1971 despite Judge Koledin's availability from April on. On October 21 he did resume the trial, thus recognizing his responsibility therefor—but he heard no testimony. Instead, on that date he merely heard brief argument on various motions then pending before him. He again recessed the trial, this time without giving any reason either on or off the record, and thereafter he refused to complete it.

On November 9, 1971 Judge Koledin issued a Finding (*not* an Order, as Judge Contie stated) in which he indicated he would issue a "judgment" setting aside the trial testimony already given and ordering a new trial. On December 3, 1971 Judge Koledin issued an interlocutory "judgment" in which he denied Petitioner's Motion to Dismiss, ruled on some other matters, and then concluded with the following pronouncement:

> "The Court further orders *on its own motion* that a new trial be granted in this cause and that the same be set for trial on December 13, 1971." [Emphasis supplied.]

This purported order for a new trial was clearly fraudulent and was later declared by the state appeals court to be void and "without legal import."!!

Judge Koledin took no further action in Case No. 282105 (except for two supplementary and interlocutory matters not relevant here, both dated December 7, 1971)

but continued to try other cases until his resignation from the bench in January, 1974.

At no time did Judge Koledin or anyone else give any reasons for (a) his refusal to complete the trial although he was able to do so, or (b) his attempt to order a new trial when it was obvious to him, to plaintiff's counsel (Respondent Calhoun herein), and to the second judge who purported to intervene, that a new trial could not be ordered. No legitimate reasons *could* be advanced; and any reasons which might be offered by Respondents can easily be shown to be false.

There were of course reasons for Judge Koledin's behavior—dishonorable reasons. Petitioner has evidence to show that Judge Koledin advised plaintiff's attorney Calhoun that he had not made out a *prima facie* case; that he (Judge Koledin) nonetheless agreed to leave the trial in recess so as to harass and coerce Petitioner into agreeing to a divorce; that during the Summer, 1971 while he was refusing to resume the trial Judge Koledin issued an interlocutory judgment against Petitioner; that (when harassment failed) Judge Koledin, some nine months after he had recessed the trial, issued his fraudulent and void "order" for a "new trial" *as a naked threat* of an unending, or perpetual, trial. For if the original trial was not to be completed, what was the likelihood that he, or anyone, would complete a "new trial"?

Also during this period of deliberate delay and harassment (and while, it might be noted, Petitioner was without counsel), Respondent Attorney Calhoun prepared and signed his approval of, and Respondent Referee Pike signed his approval of, a purported interlocutory judgment which falsely recited that there had been a court session, that Petitioner was "present in person in Court" (when there was no court at which to be present) and that

certain matters had been "duly assigned and submitted for hearing before a Referee." The falsity of these assertions was known by both these Respondents, who nevertheless submitted the proposed judgment to Judge Swaim who signed it (also of course without notice or hearing) ordering Petitioner to jail!

Clearly, had there been any merit to the case, Judge Koledin would have been asked to resume, and would have resumed, the trial in the Spring of 1971. He never did adjudicate the merits of the case or issue a final judgment.

At no time was the case, or trial, transferred to any other judge. The state courts never claimed there was a transfer; and statements by the federal courts to the contrary are entirely inaccurate.[1]

At no time was Judge Koledin's supposed illness a factor in his conduct. Even if he was ill as claimed, he admitted that he returned to his judicial duties within 4 weeks after February 12, 1971. It is his *subsequent* refusal to complete the trial, which he was perfectly able to do as shown by his participation in this and numerous other cases, of which Petitioner complains.

III. Conclusions From the Relevant Facts

Judge Koledin started the trial and was able to finish it but refused to do so, giving no reason. The case was never transferred to any other judge. It would seem apparent that *the trial has never been completed; and therefore Petitioner ought to be entitled to an injunction, at*

1. No order, or even purported order, transferring the case was made. There is no rational or logical way there could be a transfer in mid-trial—any more than there could be a "new trial" in mid-trial. Even if there were an attempt to order a transfer, therefore, it could have no validity.

least, against any purported orders based on the faulty assumption that there was ever a completed hearing. Thus, there is no final judgment or adjudication of the issues in the case which can be enforced by Respondent Judge Zurz or of which Petitioner can be in contempt. Respondents' efforts to deprive Petitioner of both liberty and property are clearly in the absence, not only of due process, but of any process at all.

It is *legally and conceptually* impossible for a "new trial", or any kind of hearing, to be conducted by anyone other than the orginal judge if he is able—particularly where the "new trial" can be based only on an order which the state courts have admitted was "without legal import." Thus, nothing which has occurred at the state level since December 3, 1971, the date of the void order, can have any legal import;[2] and the trial remains today as it was then—in midst of hearing and still uncompleted. However, Petitioner will refer to certain later events which he believes were *ultra vires* and null and void, but on which Respondents and the lower courts rely in their view of due process. By any rational logic, even these later events support Petitioner's position!

IV. Some Later Facts, but Which Are Not Relevant

a. When is a "new trial" not a new trial?!

On December 13, 1971, on the strength of the purported order for a "new trial", a second judge, one C. L. Swaim, purported to conduct a new trial, to which Petitioner of course objected *in toto*. Judge Swaim had no authorization, or even any purported authorization, to in-

2. Thus, in Petitioner's view his "appeal" to the state court of appeals, and its opinion and "judgment" are void and without legal effect. Excerpts therefrom are quoted in this Petition—but the full opinion is not included because it is not a valid document; since no appeal can be made until a trial court issues a judgment, an event which has not yet occurred.

tervene in any way in the trial. (Petitioner declined to submit his defense to Judge Swaim, believing he was entitled to a completed hearing and decision from the original judge who was still able and available and actually hearing another case that very day.) Nevertheless, some 10 months later (more harassing delay) Judge Swaim issued a purported "judgment" adverse to Petitioner.

While reserving his position that Judge Swaim's "judgment" was null and void, Petitioner tried to use orderly process of law (although nobody else was doing so). Therefore, he filed a notice of appeal from the purported "judgment". The state court of appeals *agreed* with Petitioner that as of December 3, 1971 (the date of the purported "new trial" order) "the trial of the case had not been completed" and that a new trial could not be ordered before the original trial *was* completed. It dealt with the purported order as follows:

> "The second issue that we address ourselves to is the significance of the order of Judge Koledin dated December 3, 1971 . . ."

The Ohio court found this order void and so stated at least 4 times, saying:

> "Thus, what significance can be attached to the language, 'a new trial be granted'? What is the legal result of that language? The answer is 'none'."
>
> *and*
>
> "A new trial cannot be ordered until an adverse judgment is of record."
>
> *and*
>
> ". . . it is *obvious* that a new trial could not be granted as there was not an adverse order upon which such a second order could be predicated."

and

> "We agree that the part of the order of Judge Koledin of December 3, 1971 was *without legal import.*" [Emphasis supplied.]

b. "Switching judges in midstream" of a single trial

Notwithstanding their agreement with Petitioner that Judge Koledin could not *and did not* order a new trial (*which logically left the trial still before him*), the state appeals court engaged in a dishonest *non sequitur* and created the unheard-of "concept" of "switching judges in midstream." The court said that it wasn't a new trial after all; but instead there was a continuation of the original trial and "Judge Swaim sat in place of Judge Koledin"! The state court then took the position that this was "harmless error". To reach this conclusion it had to falsify again, by claiming that Petitioner had stipulated that the testimony presented before Judge Koledin be presented to Judge Swaim. *That was not the stipulation.*

In truth, after Petitioner stated to Judge Swaim on December 13, 1971 when he proposed to conduct the "new trial",

> "I consider everything that transpires under Your Honor will have to be void and nullified." [sic],

and after Judge Swaim proposed to repeat the five days of testimony heard by Judge Koledin, Petitioner agreed to the following:

> ". . . a transcript of the *previous trial* shall be prepared and filed with the Clerk and that this Court will consider the same as evidence. . ." [Emphasis supplied.]

Six points should be mentioned here:

1—as the state court of appeals correctly noted, Petitioner "objected to the switch in judges . . ." Having so objected, obviously Petitioner did not agree to submit any part of the case to the second judge;

2—since the court of appeals had held that there was no previous trial, but instead a continuation of a single trial, their own opinion voided the stipulation which referred to the "previous trial";

3—the transcript was to be filed with the Clerk and was to be used by the "Court", not Judge Swaim;

4—if the "proceeding" before Judge Swaim was void (and the only authority was the "new trial" order which the court agreed was authority for nothing), then a stipulation made in a void proceeding was itself void;

5—even if the stipulation is thought to have been a submission to Judge Swaim, it could not confer jurisdiction on him; since jurisdiction cannot be conferred by the parties but must exist prior to the start of the "proceeding";

6—if the "proceeding" before Judge Swaim is deemed to be a continuation of the one and only trial, there would be no point or purpose to a stipulation of any sort relating to any prior testimony—*since that testimony would already be a part of the record!*

Clearly, the stipulation was entered into to avoid the senseless repetition of testimony in a "proceeding" which at the time threatened to be perpetual or unending; for if Judge Koledin wasn't going to finish the trial, what was the likelihood that Judge Swaim would complete his "new trial"? The transcript was of course *available* to Judge Swaim, just as it was available to any citizen; but that does not mean he was authorized to hear the case.

Thus, the state appeals court reached its predetermined result by *non sequitur*, creation of a "concept" unknown to the law, and falsification.

The Ohio Supreme Court refused to hear the matter, holding that "no substantial constitutional question exists herein." (*Quaere*, aren't all constitutional questions substantial?)

The Supreme Court of the United States denied Petitioner's petition for certiorari (No. 73-1853). The report of the action in a reporting service suggests that the Court was under the impression that a second judge had been assigned to complete the trial *during* Judge Koledin's "illness", and *because* of such "illness"—a mistaken impression. In any event, as will be shown in the *Sheppard* case, *infra*, this Court has granted certiorari after having previously rejected it on the identical facts.

Judge Zurz then issued his "judgment" ordering Petitioner to pay money and to be jailed; whereupon Petitioner instituted the instant action.

REASONS FOR GRANTING THE WRIT

1. Departure From the Accepted and Usual Course of Judicial Proceedings Impels This Court's Intervention.

In only one other reported American case has a judge failed to complete a trial he started and was able to finish—and this was of course held violative of due process. That case, by coincidence another Ohio case, *Sharp v. Bryan*, 119 Ohio App. 459, 200 N.E.2d 702 (1963), was a jury case, in which the original judge almost inadvertently abandoned the case after the jury retired but before it rendered

a verdict. As luck would have it, the jury emerged for instructions, which were given by a second judge. The Ohio court said, at page 704:

> ". . . we are of the opinion that the trial, once undertaken by the judge, should be attended to its final determination and conclusion. Moving on to another assignment before such time is not an excusable expediency as against the right of litigants to a fair and completed trial under due process of law."

Where, as here, there was no jury, but rather the judge was the trier of the facts, responsible for evaluating the demeanor and credibility of witnesses, due process and normal procedure require the original judge to complete the trial where he can do so.

The sanctioning by a federal court of appeals of a judge's refusal to complete a trial and the court's conclusion that there was no denial of due process in such refusal constitute approval of a truly amazing departure from the accepted course of judicial proceedings and call for this Court to intervene, per its Rule 19-1 (b).

2. "Switching Judges in Midstream" of a Trial Is a Novel Concept, If It Is a Concept At All, the Propriety and Logic of Which This Court Has Not Decided.

"Switching judges in midstream" of a trial is a concept (if it is a concept) unknown to law, an obvious violation of due process and destructive of any conceivable system of jurisprudence. It was invented by the state appeals court to cover up fraudulent conduct of the trial judge. The court knew, for a number of reasons and clear precedent in Ohio law, that it could not justify the attempted order for a new trial in the midst of the original trial.

So, while conceding that that order was "without legal import", it engaged in its own brand of fraud by asserting that there had been a continuation of a single trial and a "switching judges in midstream".

How can there be two different triers of fact in the same trial? If that is permitted, there is no limit to the number of times there could be "switching judges" during a single trial.

Has anyone ever heard of switching juries, or even a single juror, in mid-trial? If an original juror becomes disabled, an alternate may join the panel; but that alternate is a person who has attended the trial from its inception. A judge who is also the fact finder is comparable to a juror in that respect.

If there can be a switching of judges mid-trial, without any order and without any reason, *how do you ever finish a trial? How does a litigant know to which judge he should present his evidence*—inasmuch as there is no way to know which judge may deign to end the trial and issue a judgment?

Which judge is supposed to issue the judgment in a case where there has been a switch of judges mid-trial?

It must be clear to any rational person that there is no viable system of jurisprudence left in Ohio where judges are permitted to abandon cases without cause and where switching of judges is permitted. This Court has not had occasion to pass on this issue for the simple reason that no one has had the sheer gall, until now, to assert such arrant, and arrogant, nonsense.

Not only are the decisions below repugnant to common sense and elementary logic, they are in conflict with the little precedent extant. Ohio itself has condemned

"switching judges". Besides the *Sharp* case, *supra*, there is the staff note to Ohio Civil Rule 63 which clearly states:

> ". . . one judge may not replace another judge during the middle of an actual trial . . ."

Again, the leading Ohio text states:

> "A litigant has the absolute right to have the case tried before the judge duly chosen to discharge the judicial function of the court." *Judges*, 31 OHIO JUR. 2d 31.

This Court ought to disabuse judges of the notion that "switching judges" in mid-trial is compatible with due process. *"Switching judges" without reason can never be harmless error, for it constitutes a jurisdictional defect.*

3. The Integrity of State and Federal Courts, As Well As Fundamental Considerations of Due Process and Equal Protection, Beckon This Court to Review This Case.

Refusal to complete a trial, and attempting to order a new trial before the trial is completed, is *insane* behavior if done innocently. Done deliberately, as it was here, in order to exhaust Petitioner in a groundless lawsuit, it is diabolical and criminal.

The intervention, without authority and as a mere volunteer, by the second judge who purported to conduct a new trial but whose activity later was labelled instead a continuation of the trial started by the first judge, was an example of unparalleled judicial arrogance. Logically, it makes a shambles of any purported due process proceeding.

Ordering a person to jail, based on a false claim that a court hearing had been held and a matter referred to a referee, is an incredible abuse of any legal system.

The bizarre conclusion of the federal appeals court that there was no deprivation of due process or equal protection can be regarded only as a misguided attempt, demeaning to that court, to sweep under the rug a matter it knows to be a shameful reflection on the judicial fraternity. (Note the Court gave no rationale and the one case it cited, not mentioned by any party, is totally irrelevant in that it concerned a claim to a seat in a state legislature, clearly not a right established and protected by the federal Constitution.)

The Chief Justice has criticized the performance of lawyers, and that criticism is well taken. Judges are lawyers, too, and where their conduct violates their own court rules, legal precedent, canons of judicial ethics, and common sense, they are subject to correction—or should be. If rhetoric is to be followed up by action, this case presents an ideal opportunity for this Court to demonstrate its expressed concern with the behavior and obligations of both lawyers and judges.

In *Steffel v. Thompson*, 415 U.S. 452 (1974) this Court reiterated its concern for due process for individuals; at p. 474:

> "The solitary individual who suffers a deprivation of his constitutional rights is no less deserving of redress than one who suffers together with others."

In the same case, at p. 460, this Court said:

> ". . . state courts have the solemn responsibility, equally with the federal courts "to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . ." *Robb v. Connolly*, 111 U.S. 624, 637 (1884)."

Steffel was a unanimous decision with several opinions.

Constitutional rights are supposed to be available in civil cases as well as in criminal cases. This Court has shown concern for criminal defendants. Petitioner submits that where he is being deprived, and threatened with further deprivation, of both liberty and property in a so-called civil case (certainly a misnomer for divorce actions!) he is deserving of constitutional protection. This case is but one of many in which the judiciary, particularly at the state level, has shown a callous indifference to the federal Constitution. The lay public knows this as well as the legal profession—and this Court could use this case as an appropriate vehicle to remind all that the rule of law should prevail.

Due process is not defined in the Constitution, and there are no cases precisely in point—because it has been universally accepted that *a hearing will include both a unity of the tribunal and an on-going proceeding.* The cases do say that due process, at a minimum, requires that a meaningful opportunity to be heard be granted, *Boddie v. Connecticut,* 401 U.S. 371 (1971), at a meaningful time and in a meaningful manner, *Goldberg v. Kelly,* 397 U.S. 254 (1971), *Fuentes v. Shevin,* 407 U.S. 67 (1972). In *Morrissey v. Brewer,* 408 U.S. 471 (1972), the requirements for just a rudimentary hearing, in parole revocation cases, are enumerated, at p. 487—and even there it is assumed that the fact-finder will be the same throughout the hearing.

In the instant case the trial judge refused for months to do anything with the trial he had started; then he attempted to order a re-play; a second judge came along *without any authorization* and purported to hold a new trial, although there was no indication of just how far he intended to proceed; and then, in demonstrably dishonest fashion a claim is made that the "new trial" was instead a

"switching judges in midstream" of a single trial! If this is no constitutional deprivation, as the Sixth Circuit Court of Appeals has said, then surely due process no longer has any meaning.

4. The Sam Sheppard Case Demonstrates the Importance of Reviewing An Issue Previously Rejected.

In another Ohio case, Dr. Sam was convicted, by a court of common pleas, of murdering his wife. Appeals failed, and ultimately this Court denied his petition for certiorari. Years later, with much publicity and a flamboyant attorney, he sought a writ of habeas corpus. The federal district court granted the writ, but the court of appeals reversed. Then this Court, in *Sheppard v. Maxwell,* 384 U.S. 333 (1966), *granted* the petition for certiorari, noting in its first footnote (p. 335) that it had previously refused it! The basic issue was precisely the same from the time of the original trial—namely, whether Sheppard had been given due process. This Court then held, 8-1, that he had been denied due process. Its opinion has also become a landmark in the area of free speech vs. fair trial, recently cited by this Court in the *Nebraska Press Ass'n* case (6-30-76).

The *Sheppard* saga of course raises some questions as to the consistency with which this Court applies its criteria for deciding on petitions, but those questions are primarily for internal discussion by the Court. What is significant here is that this Court did not foreclose consideration of due process for Sheppard even though it had previously rejected his petition—and he was eventually completely vindicated. Similarly, the Court ought to weigh heavily the implications of the instant case despite the prior denial of certiorari.

CONCLUSION

As the matter now stands, Ohio judges do not have to finish trials they undertake and can engage, without any reason or purpose, in repeated and unending "switching judges in midstream" of a trial.

Without a requirement that a judge complete a trial he undertakes, and without a requirement that the trier of fact be the same throughout and be present throughout the hearing, there is simply no coherent process, let alone due process, which can have validity or acceptance. This Court ought to grant the writ here sought in order to define the nature, role and duties of the fact-finder, to affirm the rule of law and to attempt to restore confidence in the legal profession.

Respectfully submitted,

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August, 1976

APPENDIX A

Order of the District Court

(Filed July 2, 1975)

Civil Action C 75-159 A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ORWIN B. GRIFFIN, JR.,
Plaintiff,

v.

RICHARD V. ZURZ, etc. *et al.,*
Defendants.

ORDER

CONTIE, *J.*

Defendants have moved the Court to dismiss this action. As grounds for said motion, it is urged that the Court is without jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted. As materials outside the pleadings have been presented to and considered by the Court, this motion will be considered as one for summary judgment. Upon consideration and for the reasons stated below, the motion shall be granted.

Plaintiff initiated this action for redress of alleged violations of his constitutional rights under 42 U.S.C. §1981 and §1983. Declaratory judgment, injunctive relief, and damages are sought.

As stated by the complaint, unless otherwise noted, the essential facts are as follows:

On April 3, 1970, a divorce action was initiated against plaintiff in the Court of Common Pleas of Summit County, Ohio. This action, hereinafter referred to as Case No. 282105, proceeded to trial before Judge Koledin on February 3, 1971. After five days of trial, but before its completion, Judge Koledin refused to continue. On November 9, 1971, Judge Koledin issued an Order stating that he had become ill and was therefore unable to continue the trial.

Although Judge Koledin was capable to continuing the trial by April of 1971, he never did. In the November 9, 1971 Order, Judge Koledin set the case for hearing before Judge Swaim on December 13, 1971 and "[set] aside the testimony that was heard in the five days of trial . . ."*

Plaintiff objected to Judge Swaim's continuing the case. Apparently when his objection was overruled, Judge Swaim continued the trial. The decision in the Appellate Court indicates that plaintiff, or his counsel, stipulated that the record of the first five days of trial should be considered by Judge Swaim. Plaintiff denies this. In any event, Judge Swaim rendered judgment against plaintiff in that case on October 27, 1972.

The complaint alleges that Swaim was not a Judge of any court at any time relevant herein. However, the Appellate Court, upon plaintiff's appeal, found that Judge Swaim was retired but had been assigned to Summit County as a Common Pleas Judge by the Chief Justice of the Supreme Court of Ohio. *Griffin v. Griffin*, Case No. 7129, Court of Appeals, Ninth District of Ohio (August

*On appeal, the Court of Appeals found that this action, i.e. the setting aside of the testimony heard by Judge Koledin, was of no legal effect. *Griffin v. Griffin*, Case No. 7129, Court of Appeals, Ninth District of Ohio (August 14, 1973).

14, 1973). The Court accepts this factual statement of the Appellate Court as true, as the Court finds that plaintiff is collaterally estopped from asserting that Swaim was not a Judge at the time, because this issue has been finally adjudicated against plaintiff in the Appellate Court. See *Coogan v. Cincinnati Bar Assn.*, 431 F.2d 1209 (6th Cir. 1970).

Before Judge Swaim entered judgment in the divorce case, he entered an Order dated August 4, 1971. Said entry ordered plaintiff committed to the Summit County Jail for ten (10) days, commencing on August 9, 1971. This entry was also signed by defendant Pike, as Referee for the Common Pleas Court of Summit County, Ohio. This entry recites that it resulted from a hearing on August 2, 1971, on the plaintiff in that action's motion for an Order finding plaintiff herein in contempt of court, and that plaintiff herein having appeared, the matter was referred to a Referee for hearing. Plaintiff alleges that these recitations are false.

Defendant Calhoun, the counsel for plaintiff's wife in the divorce action, allegedly prepared this entry as well as most of the other court orders for approval and signature by the judge.

The complaint alleges that the Order of Judge Swaim, issued on August 9, 1971, was not enforced for over three years, and that it was drafted and executed with knowledge of its illegality and for the purpose of intimidating plaintiff.

On January 28, 1975, another judgment was rendered in Case No. 282105, this time by defendant Judge Zurz. Plaintiff was therein ordered to pay his former wife $7,955.00. Judge Zurz also found that defendant had not served the ten days imprisonment ordered on August 4,

1971, and therefore issued a capias to the Sheriff of Summit County to apprehend and detain plaintiff for ten days. This Order was allegedly entered with knowledge that the judgment entered by Judge Swaim was void. It is further alleged that defendant was not served with a copy of this judgment entry until about March 14, 1975, and that such delay resulted from a deliberate attempt by Zurz and Calhoun to prejudice this plaintiff's rights.

It is alleged that all three defendants acted under a color of state law, and that they acted with malice towards plaintiff.

Plaintiff seeks a declaration that the judgment of January 28, 1975 is void, apparently for lack of jurisdiction; an injunction precluding Zurz or anyone acting under him from enforcing said judgment, and enjoining all defendants from further harassing plaintiff; and $1,000,000 in damages from each defendant.

As previously stated, plaintiff claims a cause of action upon these facts exists under 42 U.S.C. §1981. However, the complaint contains no allegation of racial discrimination. Accordingly, no cause of action exists under §1981. See *Abshire v. Chicago and Eastern Illinois Railroad Co.*, 352 F. Supp. 601 (1972). Summary judgment must therefore be granted defendants on plaintiff's §1981 claim.

Plaintiff's remaining federal claims arise under 42 U.S.C. §1983. Initially, the Court notes that said action may not be maintained against defendant Calhoun. Calhoun was an attorney in private practice, representing plaintiff's wife. While, if true, the allegations of the complaint would establish less than commendable behavior on his part throughout the divorce action, Calhoun's actions were not "under color of state law" as required by section 1983. See *Nelson v. Stratton*, 469 F.2d 1155 (5th Cir. 1972); *Szijarto v. Legeman*, 466 F.2d 864 (9th Cir. 1972); *Shelton v. Randolph*, 373 F. Supp. 448 (1974). Calhoun's actions in submitting the proposed orders to judges for their approval and signature does not constitute action under color of state law. Cf. *Schatte v. International Alliance, etc.*, 182 F.2d 158 (1950) *reh. den.* 183 F.2d 685, *cert. den.* 340 U.S. 827, 71 S. Ct. 64, *reh. den.* 340 U.S. 885, 71 S. Ct. 194. Accordingly summary judgment must be granted to Calhoun.

The next issue to be considered is the question of judicial immunity on the part of defendants Zurz and Pike. At all times relevant herein, Zurz was a Judge of the Court of Common Pleas of Summit County, Ohio. Defendant Pike was a referee of said court. Their actions in this matter were judicial in character.

Thus, if their actions were within the jurisdiction of the Court of Common Pleas, or if said actions were merely in excess of that jurisdiction, they are immune from an award of damages in this suit. See *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213 (1967). Only if they acted in the clear absence of all jurisdiction may they be so liable. *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972). Plaintiff argues that only Judge Koledin had jurisdiction to continue the trial commenced in February 1971 and that the judgment of Judge Swaim is therefore void. The argument continues that as no valid judgment had been rendered in Case No. 282105, defendant Judge Zurz' entry was in the clear absence of jurisdiction. Further, it is argued that defendant Pike's finding of August 4, 1971 Order, which Judge Swaim also signed, was in the clear absence of jurisdiction since only Judge Koledin had jurisdiction of his action as of that time. Thus, the basis for plaintiff's position is his assertion that only Judge Koledin had jurisdiction of his case.

In Ohio, as elsewhere, a distinction is drawn between a court and a judge. The court is "a tribunal organized for the purpose of administering justice," while the judge "is the officer who presides over that tribunal." 14 O. Jur. 2d, *Courts* §3. Jurisdiction over the divorce action was not vested in Judge Koledin *per se*, but in the Court of Common Pleas of Summit County, Ohio. It is clear that that court had jurisdiction of the divorce case at its inception. While Judge Koledin may have had a duty to continue a trial he began, the mere fact that a different judge concluded the trial does not divest the Court of Common Pleas of jurisdiction over said action. As Judge Swaim was appointed to said court and was exercising the powers thereof, his judgment is not void for lack of subject matter jurisdiction, but at most is voidable only. Therefore, the Judge Zurz action in rendering judgment upon Judge Swaim's judgment was not in the clear absence of jurisdiction and therefore he is immune from suit in this case.

The same result obtains as to Referee Pike. As his actions relative to the Order of August 4, 1971 were within the jurisdiction granted the Court of Common Pleas of Summit County, any mistakes contained therein were error merely; Referee Pike did not act in the absence of all jurisdiction. Therefore, Referee Pike is immune from liability and damages in this action.

The fact that defendants Zurz and Pike are immune from damages does not preclude injunctive or declaratory relief. However, as said relief would amount to a review of the state court's judgment, this Court is without authority to grant such relief. "Section 1983 should not be a device to make federal courts a forum for appeals from state court litigation." *Cochran v. Barbuto*, Civil Action No. C74-106 (N.D.Ohio 1974).

Accordingly, defendants' motion for summary judgment is hereby granted.

IT IS SO ORDERED.

/s/ LEROY J. CONTIE, JR.
U. S. District Judge

APPENDIX B

Judgment Entry of the District Court

(Filed July 2, 1975)

Civil Action C 75-159 A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ORWIN B. GRIFFIN, JR.,
Plaintiff,

v.

RICHARD V. ZURZ, etc. *et al.*,
Defendants.

JUDGMENT ENTRY

CONTIE, *J.*

The Court having granted defendants' motion for summary judgment,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby granted to defendants and against plaintiff and this action is dismissed.

/s/ LEROY J. CONTIE, JR.
U. S. District Judge

APPENDIX C

Order of the Court of Appeals

(Filed April 15, 1976)

No. 75-2084

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORWIN B. GRIFFIN, JR.,
Plaintiff-Appellant,

vs.

RICHARD V. ZURZ, individually and as Judge of the Court of Common Pleas for Summit County, Ohio; WILLIAM B. PIKE, individually and as Referee of the Court of Common Pleas for Summit County, Ohio; and HOWARD L. CALHOUN, individually and as an Officer of the Court of Common Pleas for Summit County, Ohio,
Defendants-Appellees.

ORDER

BEFORE: PECK, McCREE, and ENGEL, *Circuit Judges*

Plaintiff appeals from an order granting summary judgment for defendants in an action for redress of alleged violations of constitutional rights under 42 U.S.C. §§ 1981 and 1983. The complaint sought a declaratory judgment, injunctive relief, and damages. The alleged constitutional deprivations stem from what the Ohio Court of Appeals determined to have been an irregular but harmless transfer of appellant's divorce case from one judge to another before its presentation on the merits had been completed.

Not every departure by a state from its established procedures constitutes a violation of due process of law and after a thorough examination of the record in this appeal, we determine that no constitutional deprivation occurred. Accordingly, the judgment is affirmed. *Cf. Snowden v. Hughes*, 321 U.S. 1 (1944).

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

APPENDIX D

Order of the Court of Appeals Denying Petition for Rehearing

(Filed May 27, 1976)

No. 75-2084

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORWIN B. GRIFFIN, JR.,
Plaintiff-Appellant,

vs.

RICHARD V. ZURZ, *et al.*,
Defendants-Appellees.

ORDER

BEFORE: PECK, McCREE, and ENGEL, *Circuit Judges.*

The petition for rehearing with suggestion for a rehearing en banc having come on to be heard, and no judge

having requested a vote on the suggestion for en banc consideration, and the petition having therefore been referred to the panel that heard the case, upon consideration, it is ORDERED that the petition be, and it hereby is, DENIED.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

Supreme Court, U. S.
FILED
SEP 24 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976
No. 76-266

ORWIN B. GRIFFIN, JR.,
Petitioner,

vs.

RICHARD V. ZURZ, Individually and as Judge of the Court of Common Pleas for Summit County, Ohio; WILLIAM B. PIKE, Individually and as Referee of the Court of Common Pleas for Summit County, Ohio; and HOWARD L. CALHOUN, Individually and as an Officer of the Court of Common Pleas for Summit County, Ohio,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS, RICHARD V. ZURZ AND WILLIAM B. PIKE IN OPPOSITION

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Supreme Court of the United States

October Term, 1976
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ORWIN B. GRIFFIN, JR.,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS, RICHARD V. ZURZ AND WILLIAM B. PIKE IN OPPOSITION

STATEMENT OF FACTS

The lower court granted summary judgment for the Defendants in this action wherein Plaintiff alleged violation of his constitutional rights under 42 U.S.C. 1981 and 1983. The complaint involved the Plaintiff's claim that his divorce case was not properly handled in the state courts and that the state court did not have jurisdiction to enter

orders against him. The United States District Court ruled first, that there was no complaint under 42 U.S.C. 1981 because there was no allegation of racial discrimination and second, that no cause of action existed under 42 U.S.C. 1983 because the courts have judicial immunity acting within their jurisdiction or even in excess of jurisdiction and further, that to grant the relief requested by the Plaintiff would amount to a review of a state court's judgment and in fact, make the federal court a forum for an appeal from state court litigation.

The following is a summary of the essential facts:

On April 3, 1970, a divorce action was initiated against Plaintiff in the Court of Common Pleas of Summit County, Ohio. This action, hereinafter referred to as Case No. 282105, proceeded to trial before Judge Koledin on February 3, 1971. After five days of trial, but before its completion, Judge Koledin refused to continue. On November 9, 1971, Judge Koledin issued an Order stating that he had become ill and was, therefore, unable to continue the trial.

Judge Koledin did not resume the trial. In the November 9, 1971 Order, Judge Koledin set the case for hearing before Judge Swaim on December 13, 1971 and "(set) aside the testimony that was heard in the five days of trial . . ."

Plaintiff objected to Judge Swaim's continuing the case. Apparently when his objection was overruled, Judge Swaim continued the trial. The decision in the Appellate Court indicates that Plaintiff, or his counsel, stipulated that the record of the first five days of trial should be considered by Judge Swaim. Plaintiff denies this. In any event, Judge Swaim rendered judgment against Plaintiff in that case on *October 27, 1972.*

The complaint alleges that Swaim was not a Judge of any court at any time relevant herein. However, the Appellate Court, upon Plaintiff's appeal, found that Judge Swaim was retired but had been assigned to Summit County as a Common Pleas Judge by the Chief Justice of the Supreme Court of Ohio. *Griffin v. Griffin,* Case No. 7129, Court of Appeals, Ninth District of Ohio (August 14, 1973).

Before Judge Swaim entered judgment in the divorce case, he entered an Order dated August 4, 1971. Said entry ordered Plaintiff committed to the Summit County Jail for ten (10) days, commencing on August 9, 1971. This entry was also signed by Defendant Pike, as Referee for the Common Pleas Court of Summit County, Ohio. This entry recites that it resulted from a hearing on August 2, 1971, on the Plaintiff in that action's motion for an Order finding Plaintiff herein in contempt of court, and that Plaintiff herein having appeared, the matter was referred to a Referee for hearing. Plaintiff alleges that these recitations are false.

Defendant Calhoun, the counsel for Plaintiff's wife in the divorce action, allegedly prepared this entry as well as most of the other court orders for approval and signature by the judge.

The complaint alleges that the Order of Judge Swaim, issued on August 9, 1971, was not enforced for over three years, and that it was drafted and executed with knowledge of its illegality and for the purpose of intimidating Plaintiff.

On January 28, 1976, another judgment was rendered in Case No. 282105, this time by Defendant Judge Zurz. Plaintiff was therein ordered to pay his former wife $7,955.00. Judge Zurz also found that Defendant had not

served the ten days imprisonment ordered on August 4, 1971, and, therefore, issued a capias to the Sheriff of Summit County to apprehend and detain Plaintiff for ten days. This Order was allegedly entered with knowledge that the judgment entered by Judge Swaim was void. It is further alleged that Defendant was not served with a copy of this judgment entry until about March 14, 1975, and that such delay resulted from a deliberate attempt by Zurz and Calhoun to prejudice this Plaintiff's rights.

LAW AND ARGUMENT

Having appealed the judgment through the Ohio courts of appeals and to the Supreme Court of Ohio, the complainant is now seeking to go by way of the Federal District Court for a review of state proceedings under the guise of a civil rights action which is, in effect, an attempt to appeal to the Federal District Court.

This suit is divided into two main sections; one being for damages against the Defendants, and the other being for declaratory judgment to declare the state judgment void and to enjoin the Defendants from proceedings under said state judgment.

It is the contention of the Defendants, Judge Zurz and Referee Pike, that this action cannot be maintained for damages by reason of the doctrine of judicial immunity. The doctrine of judicial immunity applies also to quasi judicial officers such as referees. See *Scarrella v. Spannous,* 376 F. Supp. 857. Also, see *Kremer v. Stewart,* 378 F. Supp. 1195. Although the facts presented in the complaint are distorted, nevertheless, taking the statements made therein for the purposes of this motion, it is obvious that we have here a domestic relations case

in a state court where judgment was rendered, where error was alleged, and appeal taken and a final adjudication made on the appeal all the way through to the State Supreme Court and the United States Supreme Court. The subject matter was all within the jurisdiction of the Defendant Judge and Referee as shown by the complaint and the rules under which they were operating were the rules of the State of Ohio Supreme Court.

The defense of judicial immunity is very broad and has been continuously upheld by the United States courts. See *Bradley v. Fisher,* 80 U.S. 335 (1871). *Pierson v. Ray,* 386 U.S. 547 (1967). *Lynch v. Johnson,* 420 F.2d 818 (6th Cir. 1970). See also the decisions of the courts which hold that judges and quasi judicial officers cannot be held liable for damages under Section 1983 for acts performed while acting in a judicial capacity where there is jurisdiction. *Bradley, supra. Hilliard v. Williams,* 465 F.2d 1212 (6th Cir. 1972). *Bauers v. Heisel,* 361 F.2d 581 (6th Cir. 1960). *Lynch, supra. Manning v. Ketcham,* 58 F.2d 948 (6th Cir. 1932). *Robichaud v. Ronan,* 351 F.2d 533 (9th Cir. 1965). In connection with this, the Court in *Bradley* stated:

> ". . . (J)udges of . . . general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter, any authority exercised is usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter is invested by

law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved . . . *Bradley, supra* at 351, 52."

It is clear from the facts pleaded that the judicial Defendants, Zurz and Pike, regardless of how they acted, were within the scope of their judicial functions.

Under no interpretation of the facts as pleaded would Defendants be liable in a civil rights action.

With reference to 42 U.S.C. Section 1981, this would not be applicable to this case since there is no allegation of discrimination against the Plaintiff relating to race.

Bradley v. Fisher, above, and *Pierson v. Ray* held clearly that the principle of judicial immunity was not abolished by Section 1983. The Supreme Court explained in *Pierson v. Ray,* as it had on prior occasions, that:

"(this immunity) is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. (*Scott v. Stansfield,* L.R., 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher . . .*)"

With reference to the Plaintiff's request for affirmative equitable relief declaring the state judgment void and for restraining orders against the Defendants, this form of relief cannot be granted in these circumstances. See U.S. District Court, Northern District of Ohio, Civil Action #C74-106, *Cochran v. Barbuto,* (Thomas, J.). Section 1983 should not be a device by which the federal courts are resorted to for appeals from state court litigation. Comity

between the federal and state courts would be violated by such a result. See *Younger v. Harris,* 401 U.S. 37 (1971). The judgment complained of here is now some three years old and has been appealed through all of the courts. Aside from the question of the lapse of an unreasonable time to discover this violation of the Plaintiff's civil rights, it must be remembered that this case is no longer before the original judges who heard the evidence, Koledin and Swaim, both deceased—Referee Pike, however, still survives. What the Plaintiff is attempting to do is to have the Federal District Court order the present Domestic Relations Judge not to enforce a judgemnt, which is a state judgment and res judicata. Obviously, this Court could not go behind Case No. 282105 and declare it null and void by virtue of the civil rights complaint filed in this Court.

In this action, under 28 U.S.C. 2201, there is no basis for judgment or injunction to resolve an actual controversy under the Civil Rights Act. See *Daniels v. Thomas* (Court of Appeals, Colorado), 225 F.2d 795, *certiorari denied,* 76 S. Ct. 303. There cannot be an appeal in the nature of review of state judicial proceedings by the Federal District Court under a purported civil rights action. See *Travelers Insurance Company v. Davis* (Court of Appeals, Pennsylvania, 1974), 490 F.2d 536.

The Civil Rights acts protect only those rights secured by the Federal Constitution and laws of the United States and not those which belong to citizens of the states (14 C.J.S. *Civil Rights Supplement,* page 21, paragraph 13). The judicial proceedings related to in the Complaint pertain only to the pleadings, hearings and orders of the state court. The state laws are applicable to all of the proceedings which are recited in the complaint. The question of substitution of judges, continuance of testimony, the

manner of conducting hearings, the hearing of motions and so forth are all matters governed by the state judicial rules and statutes and by the Rules of Superintendency of the Supreme Court of Ohio, of which judicial notice may be taken.

It is definitely established that the federal courts, under the provisions of 28 U.S.C.A. 2283, are forbidden from staying or enjoining pending state court proceedings except under specific statutory exceptions, none of which are alleged here. *Mitchum v. Foster,* 92 S.Ct. 2151, 407 U.S. 225, 32 L. Ed. 2d 705 and except where there is a clear violation of a Constitutional right. No such case exists here.

CONCLUSION

All of the actions of the Defendant Judges and Referees herein were judicial in character and within the jurisdiction of the Common Pleas Court. This has been reviewed by the Ninth District Court of Appeals and by the Supreme Court of Ohio and no error has been found. This is strictly a state judicial action. No federal constitutional rights were involved which require the intervention of a federal district court. All of the matters involved in Plaintiff's complaint are strictly within the jurisdiction of the state courts. Particular attention is drawn to the distinction made by the Federal District Court that a court is "tribunal" while the judge is the "officer" of the tribunal. The relief asked by the Plaintiff would amount to a review of the state court's judgment; therefore, the request for injunctive and declaratory relief was beyond the District Court's authority. "Section 1983 should not be a device for disappointed litigants to use in an attempt to make the federal courts a forum for appeals from state court

litigation," *Cochran v. Barbuto,* C74-106, Northern District of Ohio, 1974.

Respectfully submitted,

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Supreme Court, U. S.
FILED
SEP 22 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976

No. 76-266

ORWIN B. GRIFFIN, JR.,

Petitioner,

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT, HOWARD L. CALHOUN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1976
No. 76-266

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT, HOWARD L. CALHOUN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Howard L. Calhoun, Respondent, opposes the Petition For Writ Of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION AND ORDERS IN COURTS BELOW

The United States District Court for the Northern District of Ohio, Eastern Division, issued its order sustaining Respondents' motion to dismiss treating the same as summary judgment on July 2, 1975 (Attached to the Petition as Appendix A) (A-1).

Upon appeal by Petitioner, the United States Court of Appeals for the Sixth Circuit issued its order affirming the judgment of the District Court on April 15, 1976 (Attached to the Petition as Appendix C) (A-8) and its order denying Petition for rehearing May 27, 1976 (Attached to the Petition as Appendix D) (A-9).

QUESTIONS PRESENTED

We do not believe that the four questions presented stated in the Petition for Writ of Certiorari are in fact questions presented by the same. Respondent Calhoun says that the questions presented are as follows:

1. Was any federal question presented by the Complaint to sustain jurisdiction of the United States District Court for the Northern District of Ohio, Eastern Division?

2. Was there a valid trial of all issues within the jurisdiction of the State Court of Common Pleas of Summit County, Ohio?

STATUTE INVOLVED

42 U.S.C. Sec. 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Nature of the Case

Petitioner filed his Complaint in the United States District Court, Northern District of Ohio, Eastern Division, against Respondent Calhoun, an Attorney, and Respondents Zurz, a Judge of the Court of Common Pleas of Summit County, and Pike, a Referee of that Court. The Complaint alleged that on April 30, 1970 a divorce action was instituted against Plaintiff in the Court of Common Pleas of Summit County, Ohio and it proceeded to trial before Judge Koledin on February 3, 1971. It was further alleged that after five days of trial, Judge Koledin refused to continue and issued an order that he was ill and unable to continue. It was further alleged that on November 9, 1971 by order Judge Koledin set the case for hearing before Judge Swaim. It was alleged that Judge Swaim was not a Judge.

On August 4, 1971 before the final judgment, Judge Swaim entered an order finding Petitioner in contempt and committing him to the Summit County Jail for ten days, the entry being approved also by Respondent Pike as Referee. Petitioner claims that the recitals in that entry, that Petitioner appeared and the matter was referred to a Referee, were false. Complaint is made of another judgment on January 28, 1975 in the State Court entered by Judge Zurz finding Petitioner obligated to pay his former wife $7,966.00 and entered judgment. It also found that the previous jail sentence had not been served. It was alleged by Petitioner that he was not served with a copy of this entry until March 14, 1975 and that it was void.

Complaint was made that all Respondents acted under color of state law as to these matters and with malice towards him praying that the District Court declare that

the January 28, 1975 judgment was void, for an injunction precluding enforcement of the injunction and enjoining Respondents from harassing Petitioner and for One Million Dollars in damages as to each Defendant.

It was claimed that Respondent Calhoun prepared the various entries and submitted them for approval and filing knowing that they were false apparently because of Petitioner's claim that the Court was without jurisdiction.

Evidence with reference to these State Court proceedings was brought to the attention of the District Court and it treated Respondents' motion to dismiss therefore as a motion for summary judgment and sustained the same. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of dismissal of the District Court and denied Petition for rehearing.

STATEMENT OF RELEVANT EVIDENCE

Petitioner's entire claim is centered upon the fact that Judge Koledin tried the divorce case for five days and then discontinued it, that thereafter Judge Swaim was without jurisdiction to hear the case and could not continue a trial commenced by Judge Koledin, so that Respondent Calhoun's conduct in submitting entries and the judgment of Respondent Judge Zurz participated in by Referee Pike were false and void respectively. It was shown, however, that although Petitioner objected to Judge Swaim hearing the case, he did in fact stipulate that the evidence before Judge Koledin should be transcribed and submitted to Judge Swaim without reproducing such evidence (Petition, page 11).

Petitioner as Defendant in the State Court divorce proceeding appealed to the Ohio Court of Appeals for the

Ninth District asserting as error the claims with regard to Judge Swaim and Judge Koledin asserted in the Complaint in the District Court herein. The Court of Appeals affirmed the judgment of the Court of Common Pleas holding in effect that the new trial ordered by Judge Koledin was not in fact a new trial in the classical sense, since no judgment had been rendered but that it was akin to declaring a mistrial and ordering the trial to recommence before Judge Swaim. The Court of Appeals did not say that the order in question was void as stated at page 10 of Petitioner's Brief. The Court of Appeals held that there was no error prejudicial to Petitioner's rights and affirmed the judgment of the Common Pleas Court (Appendix A) (A-1). The same questions were brought to the Supreme Court of Ohio which denied Petitioner's motion to certify (Appendix B) (A-3).

Petitioner's Petition for Writ of Certiorari to this Court on the same questions was denied (Appendix C) (A-4).

REASONS FOR DENYING THE WRIT

I. The District Court Properly Granted Summary Judgment for Defendants, Which Judgment Was Properly Sustained by the Circuit Court of Appeals There Being No Federal Question to Sustain Jurisdiction of the United States District Court.

Petitioner's Brief specifically relates to his claim against Respondent Calhoun on pages 7 and 8 only. It must be noted that there are no citations of authorities in this part of the Brief, only innuendo and allegation. Basically, the charges against Calhoun, in Petitioner's Brief, are that as attorney for Mrs. Griffin, he prepared and submitted to Judge Swaim an entry in the summer of 1971,

knowing that it contained false statements relating to a Court session and that he prepared and submitted a Judgment of January 28, 1975 to Judge Zurz likewise knowing that Judge Zurz had no jurisdiction. Plaintiff claims a violation under 42 U.S.C. Section 1983 of the Civil Rights Act and of the Fifth and Fourteenth Amendments of the Constitution.

As will be mentioned hereafter, there is no doubt that the Court of Common Pleas of Summit County, Ohio had jurisdiction of the subject matter and over the person of the Petitioner as Defendant, Orwin B. Griffin, Jr., in that action both as to the Judgments of August 4, 1971 and January 28, 1975 and also the divorce Judgment entered by Judge Swaim as to which apparently Plaintiff feels aggrieved.

It has been held that, "Lawyers who participate in the trial of private state Court litigation are not state functionaries acting under color of state law." *Skolnick v. Martin,* 317 F.2d 855 (7th Cir. 1963). Further, it has been held, "in private litigation, the state merely furnishes the forum and has no interest one way or the other in the outcome". *Bottone v. Lindsley,* 170 F.2d 705 (10th Cir. 1948). Also, it has been held that although a private attorney is an officer of the Court, he is not an official of any state. *Steward v. Meeker,* 459 F.2d 669 (3d Cir. 1972).

To the same effect, please see also *Brown v. Dunne,* 409 F.2d 341 (7th Cir. 1969).

And in a factually similar situation it was held that a valid claim was not stated against an attorney acting in civil litigation. *Hill v. McClellan,* 490 F.2d 859 (5th Cir. 1974).

It has also been suggested in a similar claim that an attorney while acting in litigation is subject to the

same immunity as a Judge while acting within his jurisdiction. *Guerdy v. Ford,* 431 F.2d 660 (5th Cir. 1970).

The only way that Petitioner claims that the Federal Court has jurisdiction over Defendant Calhoun is that "his action was under color of state statute, custom, or usage as referred to in Sec. 1983 of the Civil Rights Act."

This question has been met by most Circuit Courts of Appeals and in *Szijarto v. Legeman,* 466 F.2d 864 (9th Cir. 1972) the Court held:

> "Plaintiff's claim was one for damages, and purportedly rested upon Civil Rights Act (42 U.S.C. Sec. 1983) . . . But this circuit, in common with others, has held that such a claim is not within the purview of the Civil Rights Act, the reason being that an attorney, whether retained or appointed, does not act 'under color of' state law. Hence, the claim is not one coming within the jurisdiction of the District Court."

A comparable quote is found in the Fifth Circuit in *Nelson v. Stratton,* 469 F.2d 1155 (5th Cir. 1972). For additional cases, see:

Shelton v. Randolph, 373 F. Supp. 448 (District Court of W.D. Va. 1974).

U. S. ex rel. Gittlemacker v. Commonwealth of Pa., 281 F. Supp. 175 (District Court E.D. Pa. 1968).

The claims as to the Respondent Calhoun were properly before the Court of Common Pleas of Summit County, Ohio and the case was appealed to the Ohio Court of Appeals and appeals were attempted to the Supreme Court of Ohio and the Supreme Court of the United States. The issues being properly before the Ohio Courts and subject to a review therein, Petitioner as Plaintiff cannot now attempt to switch to a Federal Court and again review the

State Court proceedings. In a similar case before the United States District Court, Northern District of Ohio, Civil Action #C74-106 it was Judge Thomas' opinion that Section 1983 should not be a device by which the federal courts are resorted to for appeals from state court litigation. Comity between the Federal and State Courts would be violated by such a result. See also *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). Federal Courts should not go behind what the State Courts have already considered as there has been a complete and thorough adjudication of these issues in the State Courts.

In similar situations, it has been held that a Federal Court will not exercise jurisdiction to in effect review a Judgment of a State Court. *Daniels v. Thomas*, 225 F.2d 795 (10th Cir. 1955), *Travelers Insurance Co. v. Davis*, 490 F.2d 536 (3d Cir. 1974).

II. Following the Trial Court's Decision, Petitioner Has Had This Same Matter Reviewed 5 Times by Other Courts. This Makes the 6th Review of the Same Litigation, All Previous Reviews Have Been Resolved in Favor of the Respondents' Position.

It is important to understand the history of this particular litigation and the extent to which Petitioner has had these issues considered and reviewed by the Courts (including this Court on one previous occasion).

Following the original trial Court's opinion, Petitioner went to the Court of Appeals for the Ninth District of Ohio, which issued its opinion affirming the lower Court's judgment, and entered its judgment affirming the Court of Common Pleas of Summit County, Ohio (Appendix A). Petitioner Griffin appealed to the Supreme Court of Ohio which dismissed the appeal as having no substantial constitutional question (Appendix B attached hereto). Certiorari was denied by this Court on October 15, 1974 (Appendix C attached hereto).

Following the dismissal by this Court of the Petition For Certiorari, Petitioner commenced an action in the District Court of the Northern District of Ohio, Eastern Division. That action raised the same questions which had been previously litigated in the Ohio Courts on 3 occasions and presents the same question by way of Certiorari to this Court. The District Court sustained the motions for summary judgment and that opinion is attached as Appendix A (A-1) to Petitioner's Brief. Thereafter, the Sixth Circuit Court of Appeals sustained the District Court and those entries are reflected as Appendices C (A-8) and D (A-9) to Petitioner's Brief.

All of the questions, arguments and citations in Petitioner's Brief have been exhaustively considered or reviewed by the Ohio Courts, as well as the Federal Courts on 5 previous occasions.

III. There Was Valid Trial of All Issues in the Court of Common Pleas of Summit County, Ohio.

There is no doubt that the Common Pleas Court of Summit County through Judge Swaim had jurisdiction of the subject matter and the parties in the divorce case involving Orwin B. Griffin, Jr. and Mildred Griffin.

The divorce case filed by Mildred Griffin was properly filed and there was no complaint by Petitioner in that case that the case was in the wrong jurisdiction. After Judge Koledin refused to continue hearing the case, Judge Swaim heard the case and Petitioner Griffin, as Defendant therein, stipulated that the previous five days of testimony heard by Judge Koledin could be considered by Judge Swaim, as shown on page 11 of Petitioner's Brief:

"and after Judge Swaim proposed to repeat the five days of testimony heard by Judge Koledin, Mr. Griffin agreed to the following:

'. . . a transcript of the previous trial shall be prepared and filed with the Clerk and that this Court will consider the same as evidence. . .'"

Obviously in the trial Court, Judge Swaim considered the five days of testimony given before Judge Koledin and the remaining testimony. It really doesn't make any difference what you call it, i.e. a new trial or a continuation of a previous trial, all of these issues have been thrashed out through the appeals to the Ohio Appellate Court, the subsequent appeal to the Ohio Supreme Court and the writ of certiorari to the United States Supreme Court which was denied. Therefore, this particular issue of jurisdiction has been dealt with throughout the Ohio Appeals Court and the Petitioner cannot now switch Courts to try to obtain relief through the Federal Courts system.

The Ohio Court of Appeals in its Opinion found that when Judge Koledin, after five days of trial, ordered a new trial before Judge Swaim, it was not a new trial in the classical sense since no judgment had been entered. It was, however, akin to declaring a mistrial and ordering the trial to recommence before Judge Swaim. Clearly, there was no error in these proceedings and the Ohio Court of Appeals so found. Much less could there be any claim that this should be the basis of an action in a United States Court.

As cited in Judge Contie's Opinion, the distinction between jurisdiction of the Court and jurisdiction of the Judge has been strongly made in Ohio. 14 O. JUR. 2d *Courts* § 3; *State ex rel. Hawke v. LeBlond*, 108 Ohio St. 126 (1923), 140 N.E. 510; *State of Ohio v. Lindsey*, 77 Ohio App. 191 (1945), 66 N.E.2d 256.

It is clear that jurisdiction of the divorce case was vested in the Court of Common Pleas and not in Judge Koledin so that Judge Swaim's conduct and entry of judgments were perfectly proper, and certainly within the jurisdiction of the Court.

The Complaint as to Respondent Calhoun preparing and submitting improper judgments again was completely subject to the review by the State Courts and the judgments entered within the jurisdiction of the Court. Not only does it appear that these judgments were not improper and did not contain false statements, but it appears entirely to the contrary, that they were accurate and entirely appropriate.

CONCLUSION

For the above reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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APPENDIX A

Judgment Entry of the Court of Appeals for the Ninth District of Ohio

(Filed November 26, 1973)

No. 7129

IN THE COURT OF APPEALS
SUMMIT COUNTY, OHIO

MILDRED K. GRIFFIN,
Appellee,

vs.

ORWIN B. GRIFFIN, JR.,
Appellant.

JUDGMENT AFFIRMED

This cause came on to be heard upon the notice of appeal on questions of law of the said Orwin B. Griffin, Jr., Appellant herein, together with a transcript of the docket and judgment entries of the Common Pleas Court of Summit County, Ohio, and such original papers, or transcripts thereof, as were necessary for said appeal, filed therewith in the said case, wherein Mildred K. Griffin was Plaintiff, and Orwin B. Griffin, Jr., was Defendant, mentioned and referred to in said notice of appeal, and was argued by counsel and submitted to the Court.

Upon consideration whereof, the Court finds that there is no error, prejudicial to Appellant, manifest upon the face of the record in said orders and judgment of

said Common Pleas Court of Summit County, Ohio, and, in its opinion, substantial justice has been done to the party complaining, as shown by the record of the proceedings, and the judgment under review.

It is thereupon considered, ordered and adjudged by this Court, that the judgment and proceedings of the said Common Pleas Court, in favor of the said Appellee and against the Appellant, be, and the same are hereby, in all things affirmed; there being, in the opinion of the Court, reasonable ground for this proceeding.

It is further considered and ordered, that the Appellant pay the costs of this proceeding, to be taxed, and, in default thereof, that execution issue therefor.

It is further ordered that a special mandate be sent to the Common Pleas Court of Summit County, Ohio to carry this judgment into execution.

George M. Jones (sgd)
Presiding Judge

Edwin J. Hofstetter (sgd)
Judge

Robert E. Cook (sgd)
Judge

(Judge George M. Jones, Judge Edwin J. Hofstetter, and Judge Robert E. Cook, of the Eleventh Appellate District, sitting by assignment in the Ninth Appellate District, under authority of Section 5(A)(3) of Article IV, Constitution of Ohio.)

APPENDIX B

Order of the Supreme Court of Ohio Dismissing Appeal

(Filed March 27, 1974)

No. 74-59

THE SUPREME COURT OF OHIO
THE STATE OF OHIO,
CITY OF COLUMBUS.

MILDRED K. GRIFFIN,
Appellee,

vs.

ORWIN B. GRIFFIN, JR.,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR SUMMIT COUNTY

This cause, here on appeal as of right from the Court of Appeals for Summit County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX C

Order of the Supreme Court of the United States Denying Petition for Writ of Certiorari

(Dated November 1, 1974)

No. 73-1853

SUPREME COURT OF THE UNITED STATES

ORWIN B. GRIFFIN, JR.,
Petitioner,

v.

MILDRED K. GRIFFIN

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of the State of Ohio, Summit County,

ON CONSIDERATION of the petition for a writ of certiorari herein to the Court of Appeals of the State of Ohio, Summit County,

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

October 15, 1974

Supreme Court, U. S.
FILED
OCT 12 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976
No. 76-266

ORWIN B. GRIFFIN, JR.,
Petitioner,

vs.

RICHARD V. ZURZ, Individually and as Judge of the Court of Common Pleas for Summit County, Ohio; WILLIAM B. PIKE, Individually and as Referee of the Court of Common Pleas for Summit County, Ohio; and HOWARD L. CALHOUN, Individually and as an Officer of the Court of Common Pleas for Summit County, Ohio,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Supreme Court of the United States

October Term, 1976
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ORWIN B. GRIFFIN, JR.,
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vs.

RICHARD V. ZURZ, Individually and as Judge of the Court of Common Pleas for Summit County, Ohio; WILLIAM B. PIKE, Individually and as Referee of the Court of Common Pleas for Summit County, Ohio; and HOWARD L. CALHOUN, Individually and as an Officer of the Court of Common Pleas for Summit County, Ohio,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

PRELIMINARY STATEMENT

Petitioner believes that it is imperative that this Court comprehend accurately the facts of this case and therefore submits the following in rebuttal of the very serious and inexcusable misrepresentations made by counsel for Respondents.

Please note that Respondents have not challenged any specific statements in the Petition. Thus the Petition should be regarded as fairly and accurately presenting the facts of the case. What Respondents have done instead is to try, by sly omission and juxtaposition, to create a false impression.

What the Petition sets forth, and all this Court need decide fundamentally, is the question of the validity of an unrequested, unprovoked and senseless "switching judges in midstream" of a trial. Every conscious lawyer knows that there is no such concept in law or reason as "switching judges" in the middle of a trial. The only other question is whether this Court will remedy flagrantly criminal conduct (the wilful denial of due process) by those who should be dedicated to upholding, not destroying, the Constitution.

ARGUMENT

I. The Original Trial Judge Never Made an Order Purporting to Transfer the Case, Nor Did Anyone Else Ever Make Such Order

The reader may remember from the Petition that the original judge, Judge Koledin, began the trial of the state court case, No. 282105, in February, 1971 and after five days of trial recessed the trial although it had not been completed. In October, 1971 he briefly resumed the trial, hearing argument on motions but no actual testimony. He again recessed the trial, with no explanation.

Now counsel for Respondents Zurz and Pike assert that "On November 9, 1971, Judge Koledin issued an Order stating that he had become ill and was, therefore, unable

to continue the trial." They also assert that "In the November 9, 1971 Order, Judge Koledin set the case for hearing before Judge Swaim on December 13, 1971 and '[set] aside the testimony that was heard in the five days of trial. . .' " These are repetitions of assertions made by District Judge Contie (Petition, Appendix A, p. A-2). *The quoted statements are both false and misleading.*

On November 9, 1971 Judge Koledin issued a Finding, not an Order. The Finding is included herein as Appendix PR-A.

A Finding is not an Order. In fact, there is no apparent official status to a Finding; and although there is no question that Judge Koledin issued this particular Finding, he did not sign it, which he would have done if it were to have official force. There is no provision in the state-wide Ohio rules (patterned almost exactly on the Federal Civil Rules), nor in any local rules, calling for a Finding by a judge with respect to pending motions. Apparently there was a custom of issuing a Finding as a courtesy preliminary to issuing a Judgment—perhaps to allow counsel to comment on it before a judgment is issued.

In this case the Finding issued on November 9, 1971 by Judge Koledin contained only a proposed order, not an actual order. Had it been intended as an actual order it would have ended with some such phrase as "It is so ordered." Instead, it ended with:

"Judgment order to be drawn accordingly."

As irrefutable proof that the Finding contained no order and was not intended as an order is the fact that Judge Koledin proceeded to issue an interlocutory Judgment on December 3, 1971 in which he ruled on the identical matters referred to in the Finding. (If the Finding

had had any validity, there would have been no reason to issue a Judgment covering the same matter.) The Judgment, unlike the Finding, was signed by Judge Koledin. Copy of that Judgment is included herein as Appendix PR-B.

Judge Koledin's interlocutory Judgment of December 3, 1971 varied from the proposed order in his Finding in significant respect. Thus, *the Judgment nowhere refers to another judge or purports to set aside any prior testimony*; nor does it intimate in any way that any other judge would become involved in the case. Instead, the Judgment merely states, with respect to a "new trial":

> "The Court further orders on its own motion that a new trial be granted in this cause and that the same be set for trial on December 13, 1971."

(This "order", as noted in the Petition, was considered by the state court of appeals to be "without legal import", which should have disposed of this entire controversy right then.)

The quoted language, even if valid, nowhere purports to transfer the trial—it merely purports to order a new trial. Under the ordinary procedures then in effect, any such new trial would have to be conducted by Judge Koledin, who was available and was the sole domestic relations judge of the Summit County Court of Common Pleas.

Nobody--not Judge Koledin[1], not any supervising or

1. A possible reason that Judge Koledin did not incorporate into his Judgment any "order" to have Judge Swaim preside over a "new trial" is that Petitioner took vigorous written exception to the proposals in the Finding. The gist of those exceptions was, of course, to question the need for a new trial and for another judge to be involved.

administrative judge, not anyone else—ever transferred, or even attempted to transfer, the trial to anyone. Even the state court of appeals, for all its other falsifications, made no claim that the trial was transferred; and the suggestion that the case was ever set for hearing before Judge Swaim as made by Respondents, the federal District Court, and the federal Circuit Court of Appeals is entirely false (and, Petitioner regrets to have to say, known by them to be false).

The points to be clearly understood here are two:

1—*There is no legal or logical way under any coherent system of jurisprudence that a trial can be transferred from one able-bodied judge to anyone else* (especially in the absence of any asserted or possible reason and over the objection of a party, which is admitted here); and

2—Even if there were, *nobody even attempted to transfer the trial*; and thus the second judge could not have jurisdiction or authority to act.

II. Judge Koledin Was Not Too Ill to Complete the Trial, Nor Did He Claim to Be

As noted above, Respondents assert that "On November 9, 1971, Judge Koledin issued an Order stating that he had become ill and was, therefore, unable to continue the trial." This is out of context as well as untrue, apparently to suggest that Judge Koledin was ill in November. This was not Judge Koledin's meaning or claim. What he said in the Finding was:

> "This matter is an unfortunate situation because the Court on February 3, 1971 began to hear this matter on its merits on the amended complaint and amended answer of the defendant.

> The Court, after five days of hearing the evidence, became ill and was unable to continue the matter. After the Court returned in three or four weeks, the attorneys did not seem diligent in having the matter set down and the court was negligent in not setting the matter down . . ." (Appendix PR-A, pp. 21-22)

Note that there is not even a hint or suggestion that the claimed illness lasted more than four weeks. Since the recess came on February 12, 1971 after the five days of hearing, this means that by his own admission Judge Koledin was back at work by about March 15, 1971. (Petitioner knows for certain that Judge Koledin was back at work by at least April 16, 1971 because Petitioner was in the courthouse that day applying for an auto registration.)

Judge Koledin never claimed illness with respect to Case No. 282105 other than for four weeks in February-March, 1971.

Far from claiming any inability to complete the trial, Judge Koledin freely admitted he was "negligent" throughout 1971 in not setting the trial down for completion. (This negligence was deliberate, in Petitioner's view, and was to accommodate Respondent Calhoun, who knew and had been told by Judge Koledin that there was no *prima facie* case against Petitioner.)

Petitioner has noted in various paragraphs of the Complaint in the instant case that Judge Koledin actually signed interlocutory orders on April 27, 1971 (this one in the presence of Petitioner) and July 2, 1971; that he resumed the trial briefly on October 21, 1971; that he issued his Finding on November 9, 1971; and that he issued his interlocutory Judgment on December 3, 1971. Certainly at all these times Judge Koledin was able to continue

and complete the trial; and no reason has been given for his failure and refusal to do so. Why, after admitting his negligence, he chose to "compound the felony" by issuing his fraudulent order for a "new trial", is a question he could not answer honestly and which he never tried to explain.

Judge Koledin continued to try other cases during 1971 and 1972, ran for and won reelection in November, 1972, and continued to try other cases until his resignation in early 1974. So the suggestion that he was unable, for health reasons or for any reason, to complete the trial, is totally untrue, as Respondents well know.

III. Petitioner Is Not Seeking a Review of a State Court Judgment—He Is Seeking to Prevent Enforcement of Purported Orders Which Have Not Been Preceded by a Due Process or Equal Protection Hearing, or for That Matter, by Any Hearing at All

Respondents claim that Petitioner has "appealed the judgment" in state courts. This is inaccurate. Petitioner has not been able to appeal in the state courts because there has not yet been a completed hearing or a final judgment at the trial court level. Respondents are trying to pass off a disgraceful abuse of a litigant by claiming he is seeking in federal court a second bite of the apple. This is a shoddy attempt to confuse the reader. *Petitioner has not yet gotten a first bite.* The basic facts are simple and indisputable; and the conclusions therefrom are inescapable:

1. Judge Koledin started the trial of Case No. 282105 and then refused to complete it, without reason. At one point he admitted being "negligent" but instead of doing his duty he engaged in deliberate fraud.

2. Judge Koledin, on December 3, 1971, while the trial was still pending before him, attempted to order a new trial.

3. Judge Koledin's "order" for a new trial was "without legal import." This is true not simply because the state appeals court so stated in its "opinion"—it is true because there is no legal, logical or coherent basis for ordering a new trial in the midst of a trial; and such an attempt not only leads to chaos but also is entirely incompatible with any definition of due process[2].

4. The state of affairs which existed on December 3, 1971, which was that of a trial in midst of hearing before Judge Koledin, was unchanged by the admittedly void "order" for a new trial. Thus the case remained before Judge Koledin and in midst of trial.

5. The purported "new trial" held by Judge Swaim on December 13, 1971, later claimed by the state court of appeals to be a continuation of the original trial with what that court labelled a "switching judges in midstream", was null and void and not a legal proceeding, inasmuch as the trial was still pending before Judge Koledin and had not been transferred, nor had there been any attempt to transfer it, to Judge Swaim or anyone else.

6. If the "proceeding" before Judge Swaim, whether called a "new trial" or a "continued trial", was void as having no authorization, then Judge Swaim's purported "judgment" was likewise void and without legal import.

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2. There are a multitude of reasons that Judge Koledin's "order" was void and senseless, as pointed out in the Petition (p. 15). Even taken at face value, the "order" was inchoate and incomplete, inasmuch as Ohio rules, like the Federal rules, require that a court ordering a new trial on its own motion must give a reason. No reason was stated or even suggested by Judge Koledin. See Federal Civil Rule No. 59 (d) and Ohio Civil Rule No. 59 (D).

7. If Judge Swaim's "judgment" was not legal, then Petitioner's "notice of appeal" and "appeal" to the Ohio court of appeals was without legal import, inasmuch as there was no judgment from which to appeal.[3]

Petitioner has waited patiently but in vain for the state courts to act with integrity. Comity has long since been satisfied. Where, as here, the fundamental right to constitutional due process has been so clearly violated, the federal courts can, and should, intervene. This is one of their major functions. See *Mitchum v. Foster*, 407 U.S. 225, at 243. Note, too, the Sixth Circuit Court of Appeals in the instant case believed it had jurisdiction. It simply concluded (on erroneous premises) that Petitioner had not been deprived of his constitutional rights.

IV. Jurisdiction—What It Is and Who Has It

District Judge Contie's dismissal of the instant action appears to be based on a view that, since the Court of Common Pleas had "jurisdiction" of the case, any judge of that Court could issue a judgment in the case which would be merely "voidable" but not void. This view defies legal concept and the dictates of common sense, as will be detailed below.

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3. Petitioner recognizes that there is an anomaly or arguable inconsistency in his appealing a judgment which he was contending was void. However, if he was correct that the judgment was void, the appeal proceedings logically must be regarded as void as well. The strange situation here is that the state appeals court *agreed* that the order for a new trial was "without legal import" but nevertheless tried to validate the "judgment" of Judge Swaim by declaring that there was a "switching judges in midstream" of a single trial and by *falsely* asserting that Petitioner (who they admitted had "objected to the switch in judges") had agreed to submit the case to the second judge. Petitioner cannot understand why he should be expected to accept a "judgment" arrived at with such flagrant dishonesty which is clearly evident in the record. Would the reader accept such a "judgment"?

According to Random House, jurisdiction is "the right, power or authority to administer justice by hearing and determining controversies." If this is a fair definition, it follows that the person(s) acting as fact-tinders, be it a single judge, a panel of judges, or a jury, must have jurisdiction. *The cases on jurisdiction are of no help in this regard, since there has never been a question like this before. That is, until this case there has never been a question of jurisdiction as between two judges of the same court,* for there was never more than a single fact-finder involved in the question of jurisdiction.

It advances logic not at all to say that the Court of Common Pleas has jurisdiction of a matter. It is still necessary that a judge of that court have jurisdiction, i.e. the right to hear and determine the controversy. Judge Swaim could not have jurisdiction to hear the case for the simple reason that Judge Koledin had that jurisdiction and never ceded it.

Nor does Judge Contie's comment that "While Judge Koledin may have had a duty to continue a trial he began, the mere fact that a different judge concluded the trial does not divest the Court of Common Pleas of jurisdiction over said action" face the issue. He assumes that Judge Swaim did continue and did conclude the trial. *This is, of course, the basic question—could Judge Swaim intervene while the case was before Judge Koledin*? Plaintiff-Appellant has never claimed that the Court of Common Pleas was divested of jurisdiction. But simply because the Court of Common Pleas has jurisdiction does not mean that each and every judge thereof can, without any assignment, sit "in place of" another judge "midstream".

The jurisdiction of a judge must be regarded as exclusive once he undertakes to hear the matter. This is

of course the federal rule; and to assert otherwise is to champion chaos.

The jurisdiction of a court, and the jurisdiction of a judge, are separate and distinct, because, as District Judge Contie and Respondents agree, there is a distinction between a court and a judge.[4] Yet they are claiming in effect that because the court had jurisdiction, any judge (even Judge Swaim, who at best was only a visiting judge) can walk into the courthouse, pick up the file in a case pending mid-trial before another judge, and have jurisdiction to conduct any kind of "proceeding" and issue any "judgment" he may desire! Preposterous!

V. Respondents Have Immunity Only If They Have Jurisdiction—and Then the Immunity Is Only From Damages, Not From an Injunction

a. Jurisdiction Must Be Found, Not Assumed

The District Court assumed and pre-supposed that Respondents Judge Zurz and Referee Pike had jurisdiction and therefore immunity. Petitioner agrees that, if they had jurisdiction they have immunity, according to the rule of *Pierson v. Ray*, 386 U.S. 547 (1967); although that case has a well-reasoned dissent which asks, "What about the judge who knowingly turns a trial into a 'kangaroo' court? Or one who intentionally flouts the Constitution in order to obtain a conviction?" (*ibid.* p. 566) To which Petitioner would add, "What about the judge who deliberately refuses to complete a trial?"

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4. It was precisely this distinction which was involved when Petitioner agreed that a transcript might be prepared and used as evidence by the "Court." Petitioner never agreed that anything might be considered by Judge Swaim, since Petitioner was objecting to his acting in the case in any manner.

But before we get to immunity we must determine whether jurisdiction exists. If Respondents acted in the absence of jurisdiction they have no immunity, as the Sixth Circuit Court of Appeals itself has clearly held. The case of *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972) contained no allegation that a judge acted "in absence of all jurisdiction", but that is the precise allegation Petitioner here made against Respondents Zurz and Pike (cf. pars. 25, 29, 31 and 36 of the Complaint). *Azar* confirms the opinion in *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970) that judicial immunity does not protect a judge acting in clear absence of jurisdiction or in non-judicial activities. As the Court said, at p. 820:

> "A judge does not cease to be a judge when he undertakes to chair a PTA meeting, but, of course, he does not bring judicial immunity to that forum, either."

Petitioner considers that Judge Swaim's purported "proceeding" of December 13, 1971, wholly unauthorized, was not even up to the level of a PTA meeting; and in turn, Judge Zurz's attempt to enforce a "judgment" arising out of such a non-judicial "proceeding" is without legal import.

With respect to Respondent Referee Pike, the Court held in *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972) that it would not extend the doctrine of immunity to protect a prosecuting attorney who allegedly deliberately suppressed an F. B. I. report establishing the plaintiff's innocence, because such conduct would be "outside his quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.'" (*ibid.* p. 1218). Is not the conduct of Referee Pike in purporting to hold a hearing, knowing that he had no

assignment of any sort, outside his quasi-judicial capacity? (If not, what is the function of an order of reference?)

It is beyond Petitioner's comprehension how the actions of Respondents Zurz and Pike can be regarded as within their jurisdiction. If, however, that can be established, it only gives them immunity from liability for damages; and that immunity does not prevent an injunction against their "orders."

b. The "Jurisdiction" of Judge Zurz

It is Petitioner's position that Defendant Zurz never obtained jurisdiction of Case No. 282105. As indicated in the foregoing sections, only Judge Koledin could have jurisdiction until the case is re-assigned. Judge Koledin did not attempt to re-assign the case, and no one else has since tried. (Obviously, since Judge Koledin resigned his office without completing the case, the presiding or supervising judge will now have to make an order re-assigning the case, which is still in midst of trial, to a sitting judge. That order must direct the new judge to either dismiss the complaint or to afford an opportunity for a unified hearing.) Thus, the second judge, Judge Swaim, had no jurisdiction to hear and determine the case. Since the only basis for the third judge, Judge Zurz, to act would be to enforce a valid judgment, and since the "judgment" of Judge Swaim is void (not merely voidable) for lack of jurisdiction and is the only purported final "judgment" in the case, Judge Zurz has no jurisdiction of the case and his purported "judgment" of January 28, 1975 is void (not merely voidable).

c. The "Jurisdiction" of Referee Pike

Under the Ohio Civil Rules, patterned after the Federal Civil Rules, and as acknowledged by the language of

the introductory paragraph of Judge Swaim's interlocutory "judgment" of August 4, 1971 (cf. par. 35 of the Complaint or Exhibit 2 attached to Memorandum and Affidavit in Opposition to Motion to Dismiss), a state referee can hear only those issues which are duly referred to him. Thus a referee's jurisdiction, or power or authority to hear an issue, rests upon his having been assigned by a judge to hear whatever issue(s) are specified in an order of reference.

Respondent Referee Pike was well aware of this jurisdictional prerequisite, and of course that is why the recitation appears in the purported "judgment". But the recitation is false—the certified copy of the record transmitted to the state appeals court, and other documentary evidence, clearly establishes that neither Judge Koledin nor any other judge referred any matters in the case to Referee Pike; and the Motion to Dismiss does not controvert this allegation as contained in the Complaint (pars. 35 & 36). Thus Referee Pike had no jurisdiction to recommend and approve the "judgment" of August 4, 1971 ordering Petitioner to jail. (Similarly, Judge Swaim had no jurisdiction to enter a "judgment" based on a void "proceeding" before Referee Pike; and in turn, Judge Zurz has no jurisdiction to enforce the jail term *via* his January 28, 1975 "judgment".)

The fact that Respondent Pike was a referee and was therefore eligible to be assigned to hear certain matters does not mean that he could hear any matter he chose. He could not act on his own. He had to await assignment from a judge.

d. The Conduct of Attorney Calhoun As An Officer of the Court

It is Petitioner's position that the action of Respondent Attorney Calhoun in preparing the purported "judgment" of January 28, 1975 for Judge Zurz and the purported "judgment" of August 4, 1971 for Judge Swaim was both (a) action under color of "state statute, custom or usage" as referred to in Sec. 1983 of the Civil Rights Act and (b) conduct intended to deprive Petitioner of due process and equal protection, forbidden under the Constitution and referred to in 28 U.S.C. Sec. 1343(3).

The District Court and Respondents cite cases involving suits by clients against their own attorneys, classic malpractice actions. Those cases are not applicable, because Attorney Calhoun was not counsel to the Petitioner here.

Nor is it a matter of an attorney, at an open hearing, exaggerating or misrepresenting facts in the course of representing his client (although Attorney Calhoun did this, too).

What is involved here is the preparation by an attorney, *as an officer of the court,* of a proposed judgment to be signed by a judge—in each case presented to the judge *ex parte.* Such preparation is sanctioned by universal legal law, custom and usage, and is not for the purpose of representing a client but rather to assist the judge. In such activity a lawyer must be meticulously accurate, especially as to material matters involving jurisdiction. Here, instead, Attorney Calhoun did not even grant opposing party the courtesy of showing what he intended to submit but 1) prepared and submitted the "judgment" of January 28, 1975 to Judge Zurz knowing that the latter had no jurisdiction of Case No. 282105 and 2) prepared and submitted the "judgment" of August 4, 1971 to Judge

Swaim (why not at least to Judge Koledin, one might ask?) knowing that it contained false statements of a material nature, also relating to jurisdiction.

VI. Some Further Misrepresentations by Respondent

Without conceding the accuracy of other parts of the Brief of Respondent Calhoun, Petitioner believes this Court should understand certain facts which have been misrepresented by Respondent Calhoun.

A. In its Statement of the Case, the Brief of Respondent Calhoun (p. 3) asserts that among the allegations of the Complaint, "It was further alleged that on November 9, 1971 by order Judge Koledin set the case for hearing before Judge Swaim." The Complaint, of course, made no such allegation, it being a major contention by Petitioner that no order, nor any purported order, was ever made which could serve as a basis for Judge Swaim to conduct any type of "hearing" in the state case. This is again an attempt by Respondent to mislead by trying to direct attention to the Finding of November 9 and away from the interlocutory Judgment of December 3.

B. In its Statement of Relevant Evidence, the Brief of Respondent Calhoun (p. 4) asserts that:

> "It was shown, however, that although Petitioner objected to Judge Swaim hearing the case, he did in fact stipulate that the evidence before Judge Koledin should be transcribed and submitted to Judge Swaim without reproducing such evidence (Petition, page 11)."

The stipulation, of course, did not even purport to submit anything to Judge Swaim—and it would have been curious indeed if it had, since all admit that Petitioner "objected to Judge Swaim hearing the case." The actual

stipulation is quoted at the foot of page 11 of the Petition, and it is followed immediately by 6 reasons that it could not be considered a submission of any part of the case to Judge Swaim.

C. In its Statement of Relevant Evidence, the Brief of Respondent Calhoun (p. 5) asserts that "The Court of Appeals did not say that the order in question was void as stated at page 10 of Petitioner's Brief [sic].". Respondent then refers to the purported "Judgment Entry" of the appeals court and prints that in its Brief (Appendix A thereof). *What Respondent is omitting is, of course, the purported "Opinion" of the same court, dated August 14, 1973. It was this "Opinion" from which Petitioner quoted in the Petition.* Petitioner submits that the "Opinion" of the state court of appeals, as quoted on pages 10-11 of the Petition, constitutes a clear and unequivocal statement that Judge Koledin's attempt to order a new trial was indeed void.

Petitioner did not include a copy of that "Opinion" in the Petition because, as explained in footnote 2 thereof (Petition p. 9), he does not wish to dignify it as a valid document. And, as Petitioner has argued herein, Judge Koledin's "order" for a new trial was void not simply because the state court of appeals said so but because by any logic it had to be regarded as void. However, for this Court's information, Petitioner will now include a copy of that "Opinion" as Appendix PR-C. Please note that the full "Opinion", to the extent it is grammatical, reflects the *non sequitur* of conceding that the "order" for a new trial was "without legal import" and yet claiming that the original trial continued by means of what that court terms a "switching judges in midstream".

D. By the time Respondent Calhoun's Brief gets to page 10, it does refer to the state court of appeals "Opinion" but misstates what that "Opinion" said. Respondent claims:

> "The Ohio Court of Appeals in its Opinion found that when Judge Koledin, after five days of trial, ordered a new trial before Judge Swaim, it was not a new trial in the classical sense since no judgment had been entered. It was, however, akin to declaring a mistrial and ordering the trial to recommence before Judge Swaim."

Let it be crystal clear that the Ohio Court of Appeals in its "Opinion" (Appendix PR-C herein) *did not find* that Judge Koledin ordered a new trial. It found just the opposite, i.e. that Judge Koledin's attempt to order a new trial was "without legal import." Nor did it find that the attempted "order" was akin to declaring a mistrial and ordering the trial to recommence. To the contrary, it did not claim that the trial "recommenced"—it claimed that the trial "continued" on December 13.

Nor did the appeals court claim there was a mistrial. It toyed with that idea but backed off immediately by saying "But why speculate . . ." The probable reason the court did not pursue any attempt to characterize anything as a "mistrial" is because there is no such concept in Ohio law (not even a reference to "mistrial" in Ohio's PAGE'S DIGEST). Furthermore, "mistrial" as commonly understood can have no application in a non-jury case such as this one was. Again, there was no suggestion of any *reason* that there should be a "mistrial" or that the trial should "recommence".

VII. The Basic Issue Is Simply Whether a Hearing Can Be Fragmented Between Two or More Fact-Finders, for No Reason and Over a Party's Objections

Let it be perfectly clear that Petitioner never agreed to any part of the irregular "procedure" which Ohio is attempting to impose in this matter. Even the state court of appeals, in its "Opinion", admits that ". . . appellant objected to the switch in judges . . ." (Appendix PR-C, page 27)

No rational person, then, can claim there has been due process where a trial is started by Judge K who then abandons it for no stated reason and where Judge S purports to intervene without the case having been transferred to him, all the while that Judge K is fully able to complete the trial but is instead hearing other cases.

Not only is there a lack of due process, there is a lack of any process at all. There is no logical way a "hearing" can be tossed about without any purported orders or any possible purpose. Just consider—

(a) if there can be one "switching" of judges mid-trial, without reason or purpose, what is to restrain the second judge from "switching" with a third judge, a third judge from "switching" with a fourth judge (in this case there were a possible 14 judges available!), and the fourth judge from "switching" with a fifth or even back to the original Judge Koledin, who might then start the "switching" process rolling all over again?

(b) where there is a "switching" of judges, which judge is the authorized fact-finder?

(c) which one (or more) of the "switching" judges is supposed to write the decision? Can he be overruled by another judge who has heard a different part of the case?

(d) Does a litigant have to present his case over and over again to each successive judge? Why should he without some indication that the "switching" will end?

(e) Which judge has the authority to end the trial? Or does it go on perpetually?

These are only a few of the idiotic ramifications of "switching judges in midstream" of a trial. It truly "boggles the mind."

CONCLUSION

It is understandable why Respondents have resorted to misrepresentation; and it is also understandable why various courts have likewise chosen to misrepresent the facts. However, that does not make their actions excusable, if legal ethics are to have any meaning. This case demonstrates clearly why state courts cannot yet be relied on to provide federal constitutional guarantees. To suggest that state courts can falsify and then cover that by terming it "harmless error", and that this precludes review by this Court, is to argue that any state can nullify the Constitution.

If this Court understands the simple facts of this case, it must conclude that Petitioner has been deprived of due process and equal protection. Petitioner requests that the Petition heretofore filed be granted.

Respectfully submitted,

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Attorney-Petitioner

October, 1976

APPENDIX PR-A

Finding of Judge Koledin in the Court of Common Pleas

(Filed November 9, 1971)

No. 282105

IN THE COURT OF COMMON PLEAS

STATE OF OHIO

SS

SUMMIT COUNTY

MILDRED K. GRIFFIN,
Plaintiff,

vs.

ORWIN B. GRIFFIN, JR.
Defendant.

FINDING

SAM KOLEDIN - *Judge*

This matter came on hearing before the Court on the appeal from the defendant of the Referee's recommendation wherein the Referee found the defendant guilty of contempt of court, which came on hearing on May 17, 1971. The Referee granted the plaintiff a judgment in the sum of $1,400 for arrearages in support payments to her by the defendant.

This matter is an unfortunate situation because the Court on February 3, 1971 began to hear this matter on its merits on the amended complaint and amended answer of the defendant.

The Court, after five days of hearing the evidence, became ill and was unable to continue the matter. After the Court returned in three or four weeks, the attorneys did not seem diligent in having the matter set down and the court was negligent in not setting the matter down for final hearing to complete the matter.

The plaintiff in May or thereabouts then moved that the Court find the defendant guilty of contempt in view of the fact that he had stopped paying under the temporary order made on April 14, 1971. Defendant readily admitted to the Court that he did not pay under the court order, so there is no question of his being guilty of contempt and a judgment should issue to the plaintiff in the amount of the arrearage found by the Referee.

The motion in opposition to the plaintiff's motion is overruled.

The motion in opposition to the finding of the Referee is overruled.

The motion to dismiss and motion for judgment for the defendant is overruled.

The Court will take into consideration, however, that the defendant husband was laid off as of July 20, 1971 and as of that date the Court will modify the order of April 14, 1971 from $700 a month to $200 a month for the support of the minor children.

All further orders made on April 14, 1971 will remain in full force and effect.

The Court realizes this matter should be set down and the Court sets aside the testimony that was heard in five days of trial, from February [sic] through February 11th, and hereby sets the case for hearing before Judge Luther Swaim on December 13, 1971.

Judgment order to be drawn accordingly.

APPENDIX PR-B

Judgment of the Court of Common Pleas

(Dated December 3, 1971)

No. 282105

IN THE COURT OF COMMON PLEAS

STATE OF OHIO

SS

SUMMIT COUNTY

MILDRED K. GRIFFIN,
Plaintiff,

vs.

ORWIN B. GRIFFIN, JR.,
Defendant.

JUDGMENT

This matter came on hearing before the Court on October 21, 1971 on the various motions of the defendant.

The Court, upon consideration thereof, finds that the defendant's opposition to finding which the Court considers to be a motion for review of the Referee's finding of May 17, 1971 to plaintiff's motion of April 20, 1971 and defendant's motion of April 27, 1971, should be affirmed, and accordingly, it is hereby ordered and adjudged that the judgment entered on said finding on July 2, 1971 be and the same hereby is affirmed.

The Court, upon consideration of the motion of the defendant to dismiss this cause and for an order granting

judgment in favor of the defendant, dated July 28, 1971, finds that the same should be overruled. It is accordingly ordered and adjudged that said motion be and the same hereby is overruled.

The Court, upon consideration of motion of the defendant filed on August 16, 1971 for an order modifying the monthly support order to plaintiff heretofore made on April 14, 1970, finds that defendant's employment was terminated on or about July 20, 1971 and the Court accordingly orders that said monthly payments be and the same hereby are reduced to the sum of $200 per month, beginning with the month of August, 1971. All other orders of said date are to remain in full force and effect.

The Court further orders that that portion of defendant's said motion of said date for an order permitting defendant to enter and live at the premises known as 6768 Evergreen Road, Hudson, Ohio, for an order granting defendant exclusive custody of the minor children, for an order finding plaintiff in contempt of Court, and for other relief, is hereby overruled.

The Court further orders that the remaining motion of the defendant filed on August 16, 1971 to set aside the judgment on August 4, 1971, be and the same hereby is overruled.

The Court further orders on its own motion that a new trial be granted in this cause and that the same be set for trial on December 13, 1971.

/s/ SAM KOLEDIN
Judge

APPENDIX PR-C

Opinion of the Court of Appeals of Summit County

(Dated August 14, 1973)

Case No. 7129

STATE OF OHIO, SUMMIT COUNTY
IN THE COURT OF APPEALS
NINTH DISTRICT

MILDRED K. GRIFFIN,
Plaintiff-Appellee,

vs.

ORWIN B. GRIFFIN, JR.,
Defendant-Appellant.

OPINION

JONES, *P.J.*

Before this Court for review is an order of Judge Luther Swaim, sitting by assignment, of the Court of Common Pleas of Summit County, Ohio. In essence the order dissolved the marriage between Mildred Griffin, appellee and Orwin Griffin, appellant. Further, the order provided for custody of the two minor girls, issue of the marriage, support for the girls, and a distribution or division of the property, both real and personal.

The final order followed protracted litigation and, as a result of the order, 33 errors are assigned as prejudicial to the appellant. He seeks a reversal of the order after a review by this Court. In order to pass upon each error assigned, this Court will address itself to the issues raised

by the errors as a good many of them are basically duplications.

The first issue to be considered is whether or not Judge Swaim was qualified to sit on the case. Judge Swaim is retired and was assigned to Summit County as a Common Pleas Judge (visiting judge) by the Chief Justice of the Supreme Court of the State of Ohio. Art. IV, Sec. 6(c) of the Ohio Constitution provides that any voluntarily retired judge or one retired because of age may be assigned by the Chief Justice to active duty as a judge. Appellant argues that this amendment was not legally adopted by the people of the State of Ohio. We hold to the contrary and deny appellant relief as suggested by his assigned error 13 and all others referring to this issue.

The second issue that we address ourselves to is the significance of the order of Judge Koledin dated December 3, 1971, wherein he stated:

> "The Court further orders on its own motion that a new trial be granted in this cause and that the same be set for trial on December 13, 1971."

This language is to be found in an order disposing of two written motions. Subsequently to the filing of the pleadings, this divorce proceeding became at issue and the case was commenced before Judge Koledin in February of 1971. Five days of testimony was heard by the Judge when the case was continued due to illness of the Judge. Motions were filed by both parties between February, 1971 and December 3, 1971 when the above-quoted language was put in an order. To that point the trial of the case had not been completed. Thus, what significance can be attached to the language, "a new trial be granted"? What is the legal result of that language? The answer

is "none". A new trial cannot be ordered until an adverse judgment is of record. It might be argued that the legal import is that of a mistrial. But why speculate when it is obvious that a new trial could not be granted as there was not an adverse order upon which such a second order could be predicated. On the 13th of December, 1971, the case, in effect, that was commenced in February, 1971, continued. Three things of significance should be noted here. First, Judge Swaim sat in place of Judge Koledin and, secondly, all of the evidence presented in February, 1971, before Judge Koledin was stipulated to be presented before Judge Swaim. In effect the stipulation declared that if those same parties were to appear before Judge Swaim, their testimony (and exhibits) would be as previously given, reduced to writing and presented to Judge Swaim. Thirdly, appellant objected to the switch in judges and claimed that part of the order of December 3, 1971 was for naught. We agree that the part of the order of Judge Koledin of December 3, 1971 was without legal import. However, by stipulation, appellant agreed to have all of the February evidence before Judge Swaim. So the switch in judges, although irregular, did not result in error to the prejudice of appellant. In other words, the key to our ruling on this issue of switching judges in midstream is not provided for in the Civil Rules; however, under the circumstances of the facts of this case, it cannot be said that such an irregularity amounted to more than harmless error.

Another issue raised by the errors assigned concerns itself with the holding of Judge Swaim, i.e., granting the divorce, awarding the custody and child support and the division of property. A reading of the record discloses ample evidence upon which Judge Swaim could decide as he did in this regard. Appellant offered no evidence on his own behalf and it was up to the trier of the facts

to determine whether or not appellee had made out a case. He did and we agree. Accordingly, this issue, too, is resolved in favor of the appellee.

Appellant claims that Judge Koledin erred in admitting testimony of Dr. Clemente. Appellant objected to this and, apparently, the objection has not been ruled upon. The admission of the testimony was proper. Here, too, the error, if any, was harmless. Appellant complains that Judge Koledin erred in entering an order of July 2, 1971. At this point Judge Koledin adopted a referee's report. There is no error in this regard.

Hopefully, this Court has considered all of the issues brought to its attention for review. Judgment affirmed.

/s/ GEORGE M. JONES
Presiding Judge

HOFSTETTER, J.,
COOK, J., Concur.